In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 239

RAMON FELICIANO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 422 F. 2d 943. The opinion of the district court (Pet. App. B) is reported at 297 F. Supp. 1356.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 11, 1970. The petition for writ of certiorari was filed June 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

397-877—70

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 96 (1940 ed.), recodified as 18 U.S.C. 2152, authorized the President to create a permanent defensive sea area, unrelated to occasions of actual or threatened war, for the operation of a multiple weapons range by the United States Navy around the island municipality of Culebra, Puerto Rico.

2. Whether the enforcement by the Secretary of the Navy of Executive Order No. 8684, issued pursuant to such statute, deprives plantiffs of liberty or property without due process of law or just compensation in violation of the Fifth Amendment.

STATUTE AND EXECUTIVE ORDER INVOLVED

18 U.S.C. 2152 (formerly 18 U.S.C. (1940 ed.) 96) reads in pertinent part:

> Whoever knowingly, wilfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense, may from time to time establish by executive order—
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> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Executive Order No. 8684, February 14, 1941, 3 C.F.R. 895 (1943 Supp.), is set forth at Pet. App. 22a–23a.

STATEMENT

The Island of Culebra is a municipality of the commonwealth of Puerto Rico. It consists of approxi-

mately 7,000 acres of land located between Puerto Rico and the United States Virgin Islands, and is relatively remote from concentrated shipping and air traffic. Most of its citizens, who number approximately 1,200, live near or in the town of Dewey on the southern part of the Island.

Pursuant to authority granted by Congress, 18 U.S.C. 96,[1] recodified as 18 U.S.C. 2152, the President issued Executive Order No. 8684 on February 14, 1941, creating the "Culebra Island Naval Defensive Sea Area." The Executive Order (Pet. App. 22a-23a) defines the defensive sea area as "the territorial waters between the extreme highwater mark and the three-mile marine boundary surrounding the island of Culebra." It prohibits passage through that area except as authorized by the Secretary of the Navy.

Since 1941, the Navy has conducted exercises on Culebra as part of a general program of training for the Atlantic Fleet (J.A. 52, 54; Tr. 219-221).[2]

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[1] 18 U.S.C. 96, as enacted on March 4, 1917, and in effect on the date of the issuance of Executive Order 8684, read in pertinent part:

"Whoever * * * shall knowingly, willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, shall be punished on conviction thereof * * *."

[2] J.A. refers to the Joint Appendix in the court of appeals; Tr. refers to the transcript at trial.

Culebra, with its unique characteristics,[3] is the hub of the Atlantic Fleet Weapons Range (J.A. 52). Denial of the use of the island for training exercises would eliminate the only area in the Atlantic or Caribbean wherein the combined exercises of land, sea and air training can be effectively conducted (Tr. 297; J.A. 66).

To preserve the continuity of the naval exercises, as well as to protect the people living on Culebra and passing through the area, the Secretary of the Navy deemed it essential to control ingress and egress to and from the island as authorized by Executive Order Number 8684 (J.A. 46, 55, 57). Until recently, general permission to travel to and from Culebra was restricted commercially, to two regularly scheduled commercial aircraft and a regularly scheduled ferry, and individually, to travel by the principal of the Culebran schools (J.A. 59; Tr. 63–71); others were required to obtain specific permission for each passage through or over the restricted waters, but such permission has been freely granted (J.A. 46; 55–58).

Petitioners, who are residents of Culebra, initiated this suit in the District Court for the District of Puerto Rico seeking a declaratory judgment that Executive Order No. 8684 is invalid, and a permanent injunction against its enforcement. Petitioners

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[3] The weather permits aircraft to operate practically continuously; the condition of the sea permits the firing of all types of weapons; the constant temperature and the clarity of the water are well adapted to the training of anti-submarine warfare groups; live ammunition can be expended against uninhabited areas of the island without endangering personnel (J.A. 62–63, 66–67).

claimed that the President lacked the authority under 18 U.S.C. 96 to establish defense zones in times of peace and that even if the zone around Culebra had been validly created, its administration by the Navy unduly restricts petitioners' freedom of movement and amounts to an infringement on their personal liberties and a taking of their Culebra property without just compensation. The district court rejected petitioners' claims and dismissed their complaint with prejudice. The court of appeals affirmed.

On June 17, 1970, subsequent to the filing of the petition, the Tenth Naval District in San Juan further established a Free Access Sea Sector through the restricted area on the south side of Culebra so that commercial and pleasure craft may now approach and depart from the Dewey and Great Harbor areas of Culebra without first requesting permission from the Navy.[4] As a further measure to insure the safety of the local residents, the Navy posts its schedule of operations in the town of Dewey and, at observation posts situated throughout the island, and illuminates rotating red beacons when any firing is about to commence (J.A. 60).

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[4] Regulations concerning defensive sea areas are found in 32 C.F.R. 761.1 *et seq.* They provide, in part:

"(a) Free entry into the defense areas, listed and defined in this part, and military installations contiguous to or within the boundaries of defense areas has been restricted by Executive Order or by regulation for defense purposes because of the unique strategic nature of the areas and for the protection of the military and naval bases, facilities and other installations located therein and the personnel, property and equipment

ARGUMENT

1. The district court was clearly correct in holding that 18 U.S.C. 96[5] validly authorized the President to establish and maintain the Culebra Island National Defensive Sea Area and that such authority does not depend upon the presence of actual or threatened war. Petitioners place great emphasis on a letter written by the Secretary of the Navy to the Senate Committee on Naval Affairs at the time Congress was considering the 1917 amendment to the defense zone statute.[6] While it is true that the letter did stress

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assigned to or located within such areas, bases, stations, facilities and other installations against destruction, loss or injury by accident or enemy action or by sabotage or other subversive actions. Persons, ships and aircraft are excluded unless and until they qualify for admission under the Executive Order or applicable regulation.

"(b) The control of entry into or movement within defense areas by persons, ships, or aircraft will be exercised so as to fully protect the physical security of, and insure the full effectiveness of, bases, stations, facilities and other installations within or contiguous to defense areas. However, unnecessary interference with the free movement of persons, ships, and aircraft is to be avoided." (32 C.F.R. 761.2 (a), (b).)

[5] The origins of 18 U.S.C. 96 date back to 1898, when a law dealing with harbor defense systems was passed. Act of July 7, 1898, c. 576, § 1, 30 Stat. 717. Reenacted as Section 44 of the Criminal Code in 1909, Act of March 4, 1909, c. 321, § 44, 35 Stat. 1097, the provision was amended in 1917 to give the President specific authority to issue orders and regulations governing persons or vessels within defensive sea areas. Act of March 1917, c. 180, § 44, 39 Stat. 1194. With the adoption of the United States Code in 1926, the provision became 18 U.S.C. 96. Finally, in 1948, 18 U.S.C. 96 was superseded by 18 U.S.C. 2152 in the general revision and enactment into positive law of Title 18, Act of June 25, 1948, c. 645, 62 Stat. 683, 799.

[6] Senate Committee on Naval Affairs Report No. 940, 64th Cong., 2d Sess., 1.

the need for defensive sea areas in time of actual or threatened war, the bill as passed by Congress did not contain any such limitation.

Over the years, different Presidents have issued many executive orders designating defensive sea areas pursuant to 18 U.S.C. 96 (and its successor 18 U.S.C. 2152) in times both of war and peace. Some zones created in war time were abolished at the end of the war, while others so created remained in effect. Some created in peace time remained in effect through alternate periods of peace and war which followed. For a list of executive orders creating and abolishing defensive sea areas, see appendix, *infra*, p. 9. At no time has Congress expressed any disapproval of the actions of the various Presidents with respect to defensive sea zones by seeking to amend the statutory authorization. See *Zemel* v. *Rusk*, 381 U.S. 1, 11.

As the training of naval personnel in the use of weapons is obviously a key element of national defense, the use of defensive sea areas for that purpose is clearly consonant with the statutory provisions authorizing the creation of such areas.

2. Petitioners' contentions that the administration of the Culebra defensive sea area by the Navy unduly restricts their freedom of movement, intruding upon their personal liberties and constituting an indirect taking of property without compensation, were also properly rejected by the courts below. In any event, the current practical significance of the objections raised by petitioners in contesting those regulations (Pet. 10–12) has been greatly diminished by the establishment of the Free Access Sea Sector by the

Navy on June 17, 1970. Petitioners and others are currently free to travel by water to and from the main Culebran harbors at will. The remaining restrictions on air travel are clearly reasonable and work no substantial hardship on petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1970.

APPENDIX

PRESIDENTIAL DESIGNATIONS OF DEFENSIVE SEA AREAS (ABSTRACTED FROM THE COMPILATIONS OF TITLE 3 OF THE CODE OF FEDERAL REGULATIONS)

Executive order No.	Date created	Area designated	Repealing executive order No.	Date of repeal
2584	Apr. 5, 1917	Various East, West and Gulf Coast areas, and Honolulu and Manila.	3027	Jan. 29, 1919
2597	Apr. 14, 1917	York River	3027	Do.
2898	Apr. 29, 1918	Chesapeake Bay	3027	Do.
5710	Sept. 14, 1931	do	(1)	Oct. 20, 1931[2]
5786	Jan. 10, 1932	North Carolina	11199	Feb. 24, 1965
7747	Nov. 20, 1937	San Clemente Island, Calif.	9894	Sept. 23, 1947
8143	May 26, 1939	Pearl Harbor	None	
8680	Feb. 14, 1941	Kiska and Unalaska Is.	None	
8681	do	Kanehoe Bay, Hawaii	None	
8682	do	Johnston Is., Kingman Reef Midway Is., Wake Is.	None	
8682	do	Palmyra Island	9881	Aug. 4, 1947
8683	do	Tutuila Is., Rose Is.	10341	Apr. 8, 1952
8683	do	Guam	None	
8684	*do*	*Culebra Island* [illegible]	*None*	
8717	Mar. 22, 1941	Kodiak Island	None	
8718	do	Subic Bay	9720	May 8, 1946
8749	May 1, 1941	Guantanamo Bay	None	
8853	Aug. 16, 1941	Manila Bay	9720	May 8, 1946
8953	Nov. 27, 1941	Los Angeles—Long Beach Harbor	9720	Do.
8970	Dec. 11, 1941	Boston and other New England sites	9650	Oct. 29, 1945
8970	do	San Francisco and other West Coast sites.	9720	May 8, 1946
8978	Dec. 16, 1941	New York Harbor and other East Coast sites:	9650	Oct. 29, 1945
8987	Dec. 20, 1941	Honolulu	None	
9168	May 20, 1942	Matagora Bay	9648	Oct. 25, 1945
9266	Nov. 6, 1942	Buzzard's Bay and Vineyard Sound	9650	Oct. 29, 1945
10361	June 11, 1952	Whittier, Alaska	None	

[1] Self-limited.
[2] Expired.

CERTIORARI DENIED